MAJLIS BANDARAYA SHAH ALAM v. ONLY ONE FOOT REFLEXOLOGY SDN BHD

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABANG ISKANDAR JCA
NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-149-01-2015]
13 OCTOBER 2016

LOCAL GOVERNMENT: *City Council – Search and seizure – Powers under Beauty and Health Centre (Shah Alam City Council) By-Laws 2007 – Failure to comply with by-law 28 – Lack of authority – Search and seizure without authorisation in writing by Mayor – Whether search and seizure of articles amounted to abuse of power – Lack of authority not expressly pleaded – Whether High Court decided on issue not raised in pleadings – Whether lack of authority amounted to jurisdictional issue – Whether jurisdictional issue took precedence over pleading point*

Majlis Bandaraya Shah Alam ('the appellant') approved Only One Foot Reflexology Sdn Bhd's ('the respondent') application for a licence to carry out a business to provide reflexology and aromatherapy services. The appellant's approval letter enclosed a list of conditions which the respondent had to comply with. These conditions included provisions relating specifically to massage rooms and prohibitions against alcohol, smoking, gambling and any form of violent or obscene immoral activity. It was also a condition that the licence had to be advertised clearly. The respondent then commenced its business. Pursuant to complaints by the public, the appellant's enforcement officers undertook an operation to raid and search the respondent's premises. The raiding team found that the respondent had contravened several conditions of the licence. The appellant thus issued two notices of citation of offence to the respondent, namely (i) compound no. 20110407800016 for the offence of advertising its services without the licence issued by the approving authority; and (ii) compound no. 20110407800017 for the offence of providing therapy at its business premises, which was not stipulated in the licence. The appellant, through its enforcement officers, also seized 12 mattresses from the respondent. The respondent disputed compound no. 20110407800017 as well as the seizure of its mattresses. The respondent maintained that the appellant's activities had resulted in it being unable to carry on its business as well as damaged the respondent's reputation, hence leading to loss of income. The respondent filed a claim in the High Court and sought a declaration that compound no. 20110407800017 was wrongful and an abuse of its authority pursuant to the Beauty and Health Centre (Shah Alam City Council) By-Laws 2007 ('By-Laws 2007') and an order for assessment of special and general damages. The

High Court allowed the respondent's claim, *inter alia*, on the grounds that there was non-compliance by the appellant with by-law 28 of the By-Laws 2007, which required the official of the appellant undertaking the enforcement to be authorised in writing by the Mayor. Hence the present appeal. The appellant asserted that the respondent had not pleaded the issue of the failure to obtain authorisation in writing, thus, the High Court Judge had decided on an issue which was not raised in its pleadings.

Held (dismissing appeal with costs)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) By-law 28 of the By-Laws 2007, requires that the official of the appellant, including the chief enforcement officer undertaking the enforcement, should be authorised in writing by the Mayor. There was no evidence that there was any such authorisation. The appellant did not at any time respond positively to this assertion by the respondent that there was no authorisation as envisaged under by-law 28. Even if this issue of law was not pleaded, but raised at the submission stage, it remained a point of law, which comprised an essential pre-condition to the exercise of an enforcement action by an official of the appellant. The inability to provide any such authorisation rendered the enforcement exercise undertaken wrongful and illegal. The appellant's enforcement officers had acted in excess of the authority and the acts of searching and seizing articles amounted to an illegitimate exercise of power or an abuse of power. (paras 18, 24 & 26)

(2) The lack of authority of the official who headed the enforcement exercise was a fundamental issue of law because it formed the bed-rock for the exercise of the power of entry and inspection conferred upon specific persons only under by-law 28. To ignore that issue would tantamount to condoning the exercise of powers, by persons who have no authority to do so. The ordinary public citizen ought to be defended against departmental aggression by the courts. In short, this amounted to a jurisdictional issue, which was of paramount importance. As such, the jurisdictional issue took precedence over the pleading point. In any event, the appellant could not be said to have been taken by surprise because it was incumbent on them, in the exercise of the powers under by-law 28, to be aware of the limits of such powers under by-law 28. The failure to specifically plead this point did not prejudice the appellant. (para 40)

(3) The exercise of power by the Chief Enforcement Officer of the city council did not amount to the valid exercise of a power as it did not adhere to, or fall within the ambit of by-law 28 which envisages that the power conferred must be authorised. There was no evidence to suggest that the exercise of power was authorised. Accordingly, by-law 35 did

not apply to preclude the grant of damages to the respondent. Further, the exercise of seizure did not fall within the purview of by-law 28 which does not make any provision for the seizure of articles. It only provides for entry and inspection. The power to seize (and search) falls within by-law 29, a power which was never said to be exercised and which, more significantly requires a warrant issued by a Magistrate on the basis that he reasonably believed that an offence has been committed. The acts of the enforcement team were therefore in excess of the powers, and would therefore amount to seizure made without reasonable cause. (paras 44 & 45)

Bahasa Malaysia *Headnotes*

Majlis Bandaraya Shah Alam ('perayu') meluluskan permohonan lesen Only One Foot Reflexology Sdn Bhd ('responden') untuk menjalankan perniagaan yang menyediakan perkhidmatan refleksologi dan aromaterapi. Surat kelulusan perayu melampirkan senarai syarat yang harus dipatuhi oleh responden. Syarat-syarat ini termasuk peruntukan berkaitan bilik urut dan larangan alkohol, merokok, perjudian dan apa-apa bentuk kegiatan yang tidak bermoral. Adalah syarat selanjutnya bahawa lesen perlu diiklankan dengan jelas. Responden kemudian memulakan perniagaannya. Berikutan aduan orang ramai, pegawai penguatkuasa perayu melakukan operasi serbuan dan carian di premis responden. Pasukan serbuan mendapati responden melanggar beberapa syarat lesen. Oleh itu, perayu mengeluarkan dua notis kompaun terhadap responden, iaitu (i) kompaun no. 20110407800016 bagi kesalahan mengiklankan perkhidmatan tanpa lesen kelulusan yang dikeluarkan oleh pihak berkuasa; dan (ii) kompaun no. 20110407800017 untuk kesalahan menyediakan terapi di premis perniagaannya, yang tidak dinyatakan dalam lesen. Perayu, melalui pegawai penguatkuasanya, juga merampas 12 tilam daripada responden. Responden mempertikaikan kompaun no. 20110407800017 serta rampasan tilam-tilamnya. Responden menyatakan bahawa kegiatan perayu mengganggu operasi perniagaannya serta merosakkan reputasi responden sehingga mengakibatkan kehilangan pendapatan. Responden memfailkan tuntutan di Mahkamah Tinggi dan memohon pengisytiharan bahawa pengeluaran kompaun no. 20110407800017 adalah salah dan penyalahgunaan kuasa menurut Undang-undang Kecil Pusat Kecantikan dan Kesihatan (Majlis Bandaraya Shah Alam) 2007 ('Undang-undang Kecil 2007') dan perintah untuk mentaksir ganti rugi khas dan umum. Mahkamah Tinggi membenarkan tuntutan responden, dengan alasan bahawa perayu tidak mematuhi undang-undang kecil 28 Undang-Undang Kecil 2007, yang menghendaki pegawai perayu yang menjalankan penguatkuasaan diberi kuasa secara bertulis oleh Datuk Bandar. Oleh itu, rayuan ini oleh perayu. Perayu menegaskan bahawa responden tidak memplidkan isu kegagalan mendapatkan kebenaran secara bertulis; oleh itu, Hakim Mahkamah Tinggi telah memutuskan isu yang tidak dibangkitkan dalam pliding.

Diputuskan (menolak rayuan dengan kos)
Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Undang-undang kecil 28 Undang-Undang Kecil 2007, menghendaki pegawai perayu, termasuk ketua pegawai penguat kuasa yang menjalankan penguatkuasaan, diberi kebenaran secara bertulis oleh Datuk Bandar. Tiada bukti terdapat sebarang kebenaran sedemikian. Perayu tidak pada bila-bila masa memberi respons secara positif pada penegasan responden bahawa tiada kebenaran seperti diperuntukkan bawah undang-undang kecil 28. Walaupun isu undang-undang ini tidak diplidkan, tetapi dibangkitkan semasa penghujahan, ini tetap menjadi persoalan undang-undang, yang terdiri daripada prasyarat penting untuk menjalankan tindakan penguatkuasaan oleh seorang pegawai perayu. Ketidakupayaan untuk mengemukakan kebenaran tersebut, menjadikan pelaksanaan penguatkuasaan yang dilakukan salah dan tidak sah. Pegawai penguat kuasa perayu bertindak melebihi kuasa dan carian dan rampasan artikel adalah tidak sah atau penyalahgunaan kuasa.

(2) Ketiadaan autoriti pegawai yang mengetuai pelaksanaan penguatkuasaan adalah isu perundangan yang penting kerana ini membentuk asas untuk menjalankan kuasa kemasukan dan pemeriksaan yang diberikan hanya kepada orang tertentu bawah undang-undang kecil 28. Untuk mengabaikan isu tersebut akan terjumlah kepada membenarkan penggunaan kuasa oleh orang yang tidak mempunyai kuasa berbuat demikian. Orang awam biasa harus diberi perlindungan terhadap penyalahgunaan kuasa jabatan-jabatan oleh mahkamah. Secara ringkas, ini adalah isu bidang kuasa yang amat penting. Oleh itu, isu bidang kuasa lebih penting daripada isu pliding. Walau apa pun, perayu tidak boleh dikatakan terkejut kerana adalah kewajipan perayu, dalam menjalankan kuasa bawah undang-undang kecil 28, untuk mengetahui had-had sedemikian bawah undang-undang kecil 28. Kegagalan memplidkan isu ini secara khusus tidak menjejaskan perayu.

(3) Pelaksanaan kuasa oleh pegawai perayu tidak terjumlah kepada pelaksanaan kuasa yang sah kerana tidak mematuhi, atau berada dalam lingkungan undang-undang kecil 28 yang memperuntukkan bahawa kuasa yang digunakan harus diberi kebenaran. Tiada keterangan untuk menunjukkan pelaksanaan kuasa telah diberi kebenaran. Oleh itu, undang-undang kecil 35 tidak terpakai untuk menghalang pemberian ganti rugi kepada responden. Tambahan pula, pelaksanaan rampasan tidak terangkum dalam bidang kuasa undang-undang kecil 28 yang tidak memperuntukkan sebarang penyitaan barang-barang. Ini hanya memperuntukkan kemasukan dan pemeriksaan. Kuasa rampasan (dan carian) terangkum bawah undang-undang kecil 29, kuasa yang tidak

pernah dikatakan dilaksanakan dan yang, dengan ketara memerlukan satu waran oleh Majistret atas dasar kepercayaan secara munasabah bahawa satu kesalahan telah dilakukan. Oleh itu, tindakan pasukan penguat kuasa melebihi kuasa, dan susulan itu, rampasan yang dibuat adalah tanpa sebab yang munasabah.

Case(s) referred to:
Carltona Ltd v. Commissioners of Works [1943] 2 All ER 560 ***(refd)***
Nelms v. Roe [1968] 3 All ER 1379 ***(refd)***
Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
R v. Skinner [1968] 3 All ER 124 ***(refd)***

Legislation referred to:
Local Government Act 1976, s. 102

Defence (General) Regulations 1939 [UK], reg. 51(1)

For the appellant - Mohd Yaacob Bakanali & Md Saad; M/s Lainah Yaacob & Zulkepli
For the respondent - R Kengadharan; M/s R Kengadharan & Co

[Editor's note: For the High Court judgment, please see Only One Foot Reflexology Sdn Bhd lwn. Majlis Bandaraya Shah Alam [2015] 4 CLJ 701 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] This appeal arises from a decision of the High Court of Malaya sitting at Shah Alam, which determined that the enforcement action by the appellant, namely Majlis Bandaraya Shah Alam ('the City Council'), carried out on the premises of the respondent, namely Only One Foot Reflexology Sdn Bhd ('the health care and beauty centre'), was unauthorised, and thereby unlawful. Such an unauthorised search and seizure enforcement action, it was found, contravened the relevant statutory by-laws governing the City Council's search and seizure powers under the Beauty and Health Centre (Shah Alam City Council) By-Laws 2007.

[2] Before the High Court, the primary issue for determination was whether the city council was right to issue a compound notice to the health care and beauty centre, and seize several objects from the premises. The High Court found that the terms of the licence did not expressly prohibit the services provided by the plaintiff. In the course of examining this issue and the relevant by laws and legislation, the learned judge determined that the enforcement action was unlawful, as explained above.

[3] Before us, the appeal centred primarily on whether the learned High Court Judge had erred in law when he determined that the search and seizure enforcement action by the City Council, had in fact failed to comply with the requisite by law, namely by-law 28 under the Beauty and Health Centre (Shah Alam City Council) By-Laws 2007. The further issues raised before us included the submission that this contravention had not been expressly pleaded in the statement of claim filed by the health care and beauty centre. Finally, the city council contended that the learned judge had failed to have regard to by-laws 35 and 38 of the said by-laws when determining that the health care and beauty centre was entitled to damages for the unlawful or wrongful search and seizure enforcement action undertaken by the city council.

[4] Having perused the appeal records and having heard learned counsel, we concluded that the learned trial judge had not erred in fact or in law in his decision. We therefore dismissed the appeal with costs of RM7,000 to the respondent, namely the health care and beauty centre. Our decision was centred primarily on our determination that the enforcement action that was carried out was not authorised in accordance with the requirements of the by-laws and legislation, namely the Local Government Proceedings Act 1976, and was therefore unlawful.

[5] We now append below the full reasons for our decision. It is necessary to commence with an overview of the salient facts.

[6] The health care and beauty centre was the plaintiff in the court below, and the respondent before us. The City Council was the defendant in the court below and the appellant before us. We shall continue to refer to the parties as the health care and beauty centre and the City Council respectively throughout these grounds.

Salient Facts

[7] The health care and beauty centre's business premises are situated at No. 10A (1st Floor), Jalan Anggerik Vanilla 31/93, Kota Kemuning, 40460 Shah Alam, Selangor Darul Ehsan.

[8] On 12 March 2009, the City Council approved the health care and beauty centre's application dated 18 November 2008 for a licence to carry out a business to provide reflexology and aromatherapy services. The defendant's approval letter dated 12 March 2009 enclosed a list of conditions which the plaintiff had to comply with. These conditions included provisions relating specifically to massage rooms and prohibitions against alcohol, smoking, gambling and any form of violent or obscene immoral activity. It was a condition that the licence had to be advertised clearly.

[9] The health care and beauty centre commenced business. Its licence was renewed in 2011. It is evident from a perusal of the centre's audited financial reports that it expressly stated that it was in the business, *inter alia*, of providing massage therapy services.

[10] Subsequently, according to the Chief Enforcement Officer of the City Council, one Abdul Halim Bin Hj Mahmud, SD-4 ('SD4'), the city council received complaints from members of the public that the plaintiff provided body massage services by female masseuses to male customers. No evidence was adduced at trial of these complaints.

[11] On 25 April 2011, a team of enforcement officers from the city council undertook an operation to raid and search the plaintiff's premises. Their search operation was preceded by a visit from one of their own officers, one Norzaini bin Jemakir, SD2 ('SD2') who was effectively an agent provocateur. The raiding team conducted its operation when alerted by SD2. The raiding team found that the health care and beauty centre had contravened several conditions of the licence.

[12] The defendant issued two notices of citation of offence to the plaintiff, namely:

(i) notice of citation of offence described as "compound no. 20110407800016" for the offence of advertising its services without the licence issued by the approving authority. This notice and the fine imposed are not in issue. The compound amount payable to settle the transgression was duly paid by the health care and beauty centre; and

(ii) notice of citation of offence described as "compound no. 20110407800017" for the offence of providing therapy at its business premises, which was not stipulated in the licence.

(iii) the City Council through its enforcement officers also seized 12 mattresses on the basis that it was a term of the licence that approved benches, and not mattresses were to be used for the health care and beauty centre's business.

[13] In the course of the raid cum seizure, the city council also detained several female employees who were the citizens of the Republic of China and Myanmar, taking them to the city council's premises, pending checks with the Immigration Department. After the Immigration Department confirmed that the permits of these employees were valid, they were released. This occasioned considerable problems and distress to the health care and beauty centre, in terms of its business. It is not in dispute that as a result of the raid cum seizure, the centre was unable to function for no less than 11 days, between 25 April 2011 until 4 May 2011.

[14] The health care and beauty centre, as stated earlier resolved the first citation of offence namely, compound no. 20110407800016. However, it disputed the second citation of offence namely, compound no. 20110407800017 as well as the seizure of its mattresses. The health care and beauty centre maintains that the defendant's activities had resulted in it being unable to carry on its business as well as damaged the plaintiff's reputation, hence leading to loss of income.

[15] The health care and beauty centre filed a claim in the High Court seeking, in brief, a declaration that the issuance by the defendant of the compound no. 20110407800017 dated 25 April 2011 was wrongful and an abuse of its authority pursuant to the Beauty and Health Care Centre (Shah Alam City Council) By-Laws 2007 and an order for assessment of special and general damages. The centre further pleaded that the notices of citation of offence issued by the City Council were wrongful because the offence allegedly committed by it was not stated clearly and not particularised. It further pleaded that the enforcement division of the City Council had acted in excess of its powers and abused the same.

[16] The High Court allowed the plaintiff's claim with costs of RM20,000 and granted the reliefs sought by the plaintiff. The High Court decided, as stated at the outset, that:

(i) It had not been established that the contents or terms of the licence prohibited the massage therapy services provided by the health care and beauty centre to its customers. This was because it was nowhere stated in the licence that the only type of activity the plaintiff was approved to undertake was reflexology and aromatherapy. These two therapies were only found in the application form filled in by the centre. Moreover, there was nothing stipulated in the licence itself that prohibited massage therapy by female masseuses on male customers. This was only to be ascertained in by-law 13(o) of the relevant by laws. However, the notice of citation of offence known as compound number 20110407800017 dated 25 April 2011 stipulated expressly that the plaintiff was charged with allowing or undertaking therapy that was not stipulated in the licence, at its premises. In short, the offence related expressly to the licence. No contravention of a by law, let alone by-law 13(o), was stipulated. Additionally, no term or condition in the licence was contravened as explained above. As such, the learned judge concluded on the basis of the particularisation of the offence, that no term or condition of the licence had been contravened.

    It was subsequently argued by the City Council that there was in fact a breach of by-law 13(o) of the Beauty and Health Centre (Shah Alam City Council) By-Laws 2007. However, given that the particularisation of the offence related strictly to the contents of the licence only, an extension of such particularisation to encompass by-law 13(o) cannot be readily inferred. Put another way, the health care and beauty centre was cited for not having complied with the express provisions in the licence. That specific offence could not then be extended to encompass a contravention of by-law 13(o) of the Beauty and Health Centre (Shah Alam City Council) By-Laws 2007;

(ii) More significantly, and this appears to be the nub of the judgment, the raid and seizure operation undertaken by the enforcement division of the city council was unlawful, as the officer in charge had not obtained the

A authorisation in writing from the Mayor or secretary of the city council prior to undertaking enforcement activities as expressly required under by-law 28;

(iii) Accordingly, all enforcement and seizure made pursuant to this unlawful enforcement is similarly tainted and thereby bad in law.

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[17] The City Council asserted that the health care and beauty centre had not pleaded the issue of the failure to obtain authorisation in writing. The learned judge did not expressly deal with this objection in his grounds. Therefore the defendant filed the appeal before us, arguing that the High C Court Judge had decided the case on an issue which was not raised in its pleadings.

Decision Of The Court Of Appeal

[18] As stated at the outset, we dismissed the appeal with costs. This was primarily because we were of the considered opinion that by-law 28 of the D Beauty and Health Centre (Shah Alam City Council) By-Laws 2007, requires that the official of the city council undertaking the enforcement is authorised in writing by the Mayor. There was no evidence that there was any such authorisation. The City Council did not at any time respond positively to this assertion by the centre that there was no authorisation as envisaged under by-E law 28. Even if this issue of law was not pleaded, but raised at the submission stage, it remains a point of law, which comprises an essential pre-condition to the exercise of an enforcement action by an official of the City Council. The inability to provide any such authorisation, rendered the enforcement exercise undertaken, wrongful and illegal. To that end, we upheld the F decision of the learned High Court Judge.

Applicable Laws

[19] The Beauty and Health Centre (Shah Alam City Council) By-Laws 2007 were promulgated pursuant to s. 102 of the Local Government Act 1976.

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[20] The definition of a health care centre is provided in by-law 2 of the Beauty and Health Centre (Shah Alam City Council) By-Laws 2007, as follows:

> "health care centre" means any premises used to provide body massage H or treatment or physical fitness exercise with or without equipment. The types of treatment are as prescribed in the Third Schedule; ...

[21] By-law 28 which is entitled "power to enter and inspect" provides as follows:

> I 28(1) **The Licensing Authority** or any police officer not below the rank of Inspector may at all reasonable time(s) [sic] without warrant for the purpose of ascertaining whether the conditions or restrictions of a licence or the provision of this [sic] By-Laws are being complied with:

(a) enter any beauty or health care centre; and

(b) carry out any power of inspection at such place [sic] beauty or health care centre. (emphasis added).

[22] By-law 2 of the Beauty and Health Care Centre (Shah Alam City Council) By Laws 2007 which is the definition section, provides *inter alia* as follows:

"**Licensing Authority**" means the Mayor or Mayor or secretary of a local authority **or any officer authorised in writing by the Mayor or Mayor thereof**; (emphasis added).

[23] As these by-laws are promulgated pursuant to the Local Government Act 1976, it is pertinent that in s. 2 the definitions for Mayor and Secretary provide *inter alia* as follows:

(a) ...

(b) a 'local authority' means 'any City Council, Municipal Council or District Council, as the case may be and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under section 4 of the Federal Capital Act 1960;

(c) a 'Mayor' means 'the person for the time being lawfully performing the duties of the office of Mayor of a City Council and includes the Deputy Mayor ...

(d) and a 'Secretary' means the 'Chief Administrative Officer appointed by the State Authority or any officer for the time being lawfully performing the duties of Chief Administrative Officer.

[24] Therefore, it is envisaged from a consideration of these provisions, particularly by-law 28 read together with the definition of a licensing authority, that in order to exercise the power of entry and inspection (let alone search and seizure), any official of the City Council, including the chief enforcement officer, should be authorised in writing by the Mayor.

[25] The learned trial judge concluded that there was nothing before the court to establish that the chief enforcement officer who falls within the definition of an officer was duly authorised by the licensing authority as expressly required under by-law 28. The learned judge went on to conclude that there was a failure to comply with these express provisions, as a consequence of which the entry and inspection, or more properly the search and seizure enforcement exercise, contravened by-law 28 fundamentally.

[26] It follows that if the chief enforcement officer was not authorised in writing to enter and inspect the premises, far less to search and seize articles, that the entire enforcement exercise was unlawful and/or illegal. The chief enforcement officer and his team had acted in excess of the authority conferred on them and the acts in searching and seizing articles amounted to an illegitimate exercise of power or an abuse of power.

[27] It is further notable that while by-law 28 provides for the power to enter and inspect only, and which does not require a warrant, by-law 29 expressly provides for the licensing authority or a police officer not below the rank of Inspector to enter and search the premises. This however requires authorisation by way of a warrant from a Magistrate who must have reason to believe that an offence has been committed or that it is necessary for the investigation into an offence. In the instant case, the search and seizure was undertaken without any such warrant, but merely on the basis of the authorisation under by-law 28. Apart from the lack of authorisation of the chief enforcement officer and his team, these express provisions of the by-laws beg the question as to whether the enforcement officers were able to search and seize without complying with by-law 29. These factors as a whole contribute to the conclusion reached by the learned judge that the officers of the City Council had acted in excess of their powers.

[28] This brings to mind the renowned statement by Almarhum Sultan Azlan Shah (Chief Justice) in the oft-cited case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 FC ('the *Sri Lempah* case'):

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Danckwerts L.J. in *Bradbury v. London Borough of Enfield* [1967] 3 All ER 434 442).

[29] In the instant case, the scenario is somewhat worse than that in the *Sri Lempah* case (above), as the enforcement exercise was undertaken pursuant to a discretion afforded under the by-law but without the requisite authorisation. However, the heart of the complaint put forward by the health care and beauty centre in the court below was that the enforcement exercise had far exceeded its limits, and essentially became an abuse of power by the enforcement officials. It is an example of 'departmental aggression' as envisaged above. This is borne out by the arrest and detention of the employees of the health care and beauty centre as well as the seizure of articles, in this instance twelve mattresses, by the enforcement officials.

[30] In this context, the fact that there may well have been a contravention of by-law 13(o) which prohibits the provision of massage therapy by female masseuses to male customers, does not in itself justify or excuse the lack of authorisation of the officials carrying out the enforcement exercise, or the acts of arrest and detention as well as seizure, which are not encompassed within by-law 28. The latter acts of enforcement more properly fall within by-law 29 which requires a warrant from a Magistrate.

[31] The City Council contended in essence that there was no requirement to produce authorisation in writing from the Mayor to the health care and beauty centre prior to conducting an inspection of the premises as there was no provision either under the Local Government Act 1976 or the by-laws for the enforcement unit to produce such authorisation in writing prior to carrying out inspection. Further, it was contended that it was unreasonable to require the Mayor to issue authorisation in writing every time an inspection needed to be carried out. In support of this, the City Council relied on the English Court of Appeal case of *Carltona Ltd v. Commissioners of Works* [1943] 2 All ER 560 (*Carltona*'s case) where it was held that the duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the Ministers by responsible officials of the department.

[32] In *Carltona*'s case, the appellants Carltona Ltd were manufacturers of food products. Their factory was requisitioned by the Commissioners of Works under the provisions of the Defence (General) Regulations 1939 more particularly reg. 51(1). The appellants commenced proceedings against the commissioners questioning the validity of the order of the commissioners of works, disputing *inter alia* that the notice issued to them in relation to the requisitioning of their premises. It was contended that the requisitioning authority had not brought their minds to bear upon the question of the requisition and if they had, they could not have come to the conclusion which they did.

[33] Regulation 51(1) is in these terms:

> A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war or for maintaining supplies, and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land.

[34] The specific passage relied upon in this context reads as follows:

> In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To

> take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. **The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department**. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them." (emphasis added)

[35] It is evident that *Carltona*'s case is readily distinguishable from the present case. It is clear that in each of these instances where an official undertakes or performs duties on behalf of the Minister, he is duly authorised by the Minister to do so. This amounts to a delegation of authority.

[36] In the instant case, however there was no evidence produced to show that the licensing authority, namely the Mayor or secretary, had delegated such power to the chief enforcement officer by way of subsidiary legislation; more significantly there was nothing to indicate that the chief enforcement officer was authorised in writing by the licensing authority to undertake the entry and inspection of the subject premises, let alone the search and seizure that subsequently followed. If indeed the chief enforcement officer was able to demonstrate that he had been so authorised, or that the powers of the licensing authority had been delegated to him, then this issue would never arise. The words of by-law 28 are express and clear. An official requires the authorisation in writing from the licensing authority to undertake an entry and inspection of the subject premises as a condition precedent to any enforcement exercise.

[37] The next case relied upon by the City Council was the English case of *R v. Skinner* [1968] 3 All ER 124 (*Skinner*'s case) where similarly the point was made that:

> ... no Minister could personally consider the thousands of requisitioning cases which arose during the war, and by contrast he says that this isolated and vitally important matter might well have occupied the Minister's personal attention … It is a matter for him, and **the decision to approve in this case was taken by someone who properly could act on the Minister's behalf** and this was proved to the standard required in a criminal trial. (emphasis added).

[38] It is equally apparent that in *Skinner*'s case too, the duty of the Minister was performed by someone who had had the task or power properly delegated to him. That is the meaning to be attributed to the italicised and underlined words above. Again, it is quite distinguishable from the facts of our case where the chief enforcement officer of the City Council was not so authorised. Neither was the power to enter and inspect delegated to him. Hence, the requirement for authorisation to be in writing. If the Mayor had in fact authorised the official in respect of all or any enforcement exercises this would be sufficient for him to undertake these activities under by-law 28. However, in the absence of such authorisation it would amount to a fatal defect and an abuse of powers because the by-law does not envisage such enforcement by any persons other than those specified in the Act. The title of chief enforcement officer in no way alleviates the need for authorisation in writing from the licensing authority.

[39] As for the final English case of *Nelms v. Roe* [1968] 3 All ER 1379 where the court held that delegated authority could be implied in respect of the acts of the proper officers of the Minister's department, that case too is inapplicable in the face of by-law 28 as explained above. This is particularly so as the express words of the by-law require authorisation in writing in respect of any official who is not the licensing authority.

The Lack Of Authority Was Not Pleaded Expressly

[40] We were of the view that the lack of authority of the official who headed the enforcement exercise was so fundamental an issue that it could not simply be ignored. It is a fundamental issue of law because it forms the bed-rock for the exercise of the power of entry and inspection conferred upon specific persons only under by-law 28. To ignore that issue would be tantamount to condoning the exercise of powers which are both formidable and intimidating, by persons who have no authority to do so. The ordinary public citizen ought to be defended against departmental aggression by the courts, and this case affords just such an example. In short, this amounts to a jurisdictional issue, which is of paramount importance. As such the jurisdictional issue takes precedence over the pleading point. In any event, the City Council cannot be said to have been taken by surprise because it was incumbent on them, in the exercise of the powers under by-law 28, to be aware of the limits of such powers under by-law 28. The failure to specifically plead this point does not prejudice the City Council.

[41] In point of fact, as has been stated in the body of the judgment, the acts of the enforcement officials in this case were not proportionate to the scope of enforcement envisaged in by-law 28. It provides only for entry and inspection, but in the instant case the acts of the officials extended to matters such as arrest of employees and seizure of articles which would properly have required a warrant from a Magistrate under by-law 29.

[42] Proportionality is an important aspect of the exercise of an administrative power. Any acts or omissions in excess of the strict limits of the power conferred would amount to an abuse of such power, and should therefore attract the requisite sanction from the courts whose duty it is to protect the rights of the public.

Damages

[43] The City Council relies on by-laws 35 and 38 to maintain that no damages are payable by them to the respondent. By-law 35 provides as follows:

> No person shall be in any proceedings before any court in respect of anything seized **in the exercise of any power conferred under these By-Laws** be entitled to the costs of such proceedings or to any damages or other relief **unless such seizure was made without reasonable cause**. (emphasis added).

[44] The phrase 'exercise of any power' envisages or should be interpreted as the valid exercise of a power conferred under the by-laws. The exercise of power in this case by the chief enforcement officer of the City Council does not amount to the valid exercise of a power as it did not adhere to, or fall within the ambit of by-law 28 which envisages that the power conferred must be authorised. There was no evidence to suggest that the exercise of power was authorised. Accordingly, by-law 35 does not apply to preclude the grant of damages to the respondent.

[45] Further, the exercise of seizure did not fall within the purview of by-law 28 which does not make any provision for the seizure of articles. It only provides for entry and inspection. As stated numerous times in this judgment, the power to seize (and search) falls within by-law 29, a power which was never said to be exercised and which, more significantly requires a warrant issued by a Magistrate on the basis that he reasonably believes that an offence has been committed. The acts of the enforcement team were therefore in excess of the powers conferred by them, and would therefore amount to seizure made without reasonable cause.

[46] By-law 38 provides as follows:

> **The Council or any authorised officer** enforcing any of these By Laws shall not be liable for any damage or any loss resulting from the said enforcement. (emphasis added)

[47] Again, it follows that it is only the act of the city council or any authorised officer which precludes the grant of damages for loss suffered as a result of the enforcement. In the instant case, the chief enforcement officer was not authorised to lead his enforcement team to carry out the entry, inspection, search and seizure. Therefore by-law 38 also does not apply for the reasons set out above.

Conclusion

[48] For the cumulative reasons stated, we were of the unanimous view that the learned judge had not erred in fact or in law in arriving at his decision. There was no necessity for appellate intervention. We therefore dismissed the appeal and ordered costs of RM7,000 to be paid by the city council to the health care and beauty centre. The deposit was refunded to the appellant.